

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE ZUPKO and U.S. POSTAL SERVICE,
POST OFFICE, Kingston, PA

*Docket No. 00-1107; Submitted on the Record;
Issued December 14, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

On January 28, 1988 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower back while putting a tray of mail into a hamper. The Office accepted the claim for low back strain which was later expanded to include a herniated lumbar disc and placed on the automatic rolls for temporary total disability effective July 3, 1988. Appellant returned to light duty effective March 18, 1989. He filed a recurrence claim on May 22, 1992 which the Office accepted and approved lumbar spine surgery. Appellant was placed on the automatic rolls effective January 9, 1993. On August 3, 1994 the Office authorized L4-S1 decompression, stabilization and fusion surgery.

In a work capacity evaluation (OWCP Form 5-c) dated June 13, 1997, Dr. Keith R. Kuhlengel, an attending Board-certified neurological surgeon, concluded that appellant was capable of working four hours per day with restrictions on sitting, standing, walking and lifting.¹

A December 15, 1997 report by Dr. Emmanuel E. Jacob, an attending Board-certified physiatrist, opined that appellant was totally disabled due to his employment injury.

In a report dated February 15, 1998, Dr. Kuhlengel, based upon a review of an investigative tape of appellant and the limited-duty job offer, concluded that appellant was capable of performing the duties listed in the position. Dr. Kuhlengel noted that "[c]learly based on the video showing him carrying bags of leaves and the shoveling of snow, he should be able to perform this limited-duty assignment."

¹ Dr. Kuhlengel advised the Office by letter dated February 18, 1998 that he had discharged appellant from his care due to appellant's failure to keep his January 7, 1998 appointment and noncompliance.

In a May 20, 1998 report, Dr. Jacob noted “hypoesthesia in the left lower limb particularly along the L5-S1 dermatome,” tight muscle tone and limited lumbar motion, left straight leg elevation of 65 degrees and the left “knee and the ankle reflexes were present but hypotonic” compared to the right knee and ankle reflexes.

In a June 3, 1998 report, Dr. Sanford B. Sternlieb, a second opinion Board-certified orthopedic surgeon, concluded that appellant would be capable of performing the offered position. In support of this conclusion, Dr. Sternlieb noted that appellant had degenerative changes in his back which were due to the aging process and unrelated to his accepted employment injury. He also noted that “[t]here is no evidence that the relatively mild episode of January 1988, nor the complaint of pain in May 1992 has resulted in any aggravation or acceleration of the preexisting degenerative process. Dr. Sternlieb opined:

“[Appellant’s] prognosis must be regarded as guarded because he has been out of work for such a prolonged period of time and it is obvious that his self image is one of having a severe impairment, something which I do not feel is consistent with the physical findings, *i.e.*, no muscle atrophy or weakness, no motion on bending films, normal reflexes. As well, it is not possible to ignore the findings of his abilities which have been documented on videotape in November and December 1997, indicating an ability to bend, twist, lift, stoop and stretch.”

On July 9, 1998 the employing establishment offered appellant the position of modified letter carrier for four hours per day. The position duties included casing mail and the physical requirements were noted as standing 20 to 30 minutes for a total of 2 hours per day, sitting 20 minutes up to 2 hours per day, walking 15 minutes for a total of 1 hour and occasional lifting of up to 5 pounds with no bending.

By letter dated July 13, 1998, appellant indicated that he was neither accepting nor rejecting the job offer, until he and his attorney have had an opportunity to review Dr. Sternlieb’s report. In a subsequent letter dated July 15, 1998, appellant reiterated that he was unable to respond to the job offer until he had consulted with his attorney who was out of the country.

By letter dated July 27, 1998, the Office advised appellant that the offered position was determined to be suitable and that he had 30 days within which to accept it. The Office advised appellant of the penalty provisions of 5 U.S.C. § 8106(c).

By response dated August 28, 1998, appellant’s counsel rejected the offered position. He indicated that he refused the position based upon the opinion of Dr. Jacob who indicated appellant was incapable of performing the duties of the offered position.

By letter dated September 9, 1998, the Office found that appellant’s reasons for refusal of the position were not justified and advised him that he had 15 days to accept the job. The Office advised appellant that his supervisor had identified him in the surveillance video.

In a September 17, 1998 report, Dr. Jacob opined that appellant had “a permanent impairment of the lumbosacral spine which renders him to be totally disabled.” He noted physical findings of tightness in his lumbar paravertebral muscles, straight leg elevation of 60

degrees and “some hypoesthesia along the left L5 and the lower limb” with reflexes present in the knees and ankles.

By decision dated November 12, 1998, the Office terminated appellant’s monetary compensation on the basis that he refused an offer of suitable work. In reaching this decision, the Office relied upon the opinions of Drs. Kuhlengel and Sternlieb.

On November 17, 1998 appellant’s counsel requested reconsideration of the decision terminating appellant’s monetary compensation.

In a December 7, 1998 report, Dr. Jacob noted physical findings of “muscle tone in the back is spastic and he is quite tender along the L4-5, S1 segment” and 30 degrees of flexion in the lumbar spine, 10 degrees lateral flexion and 5 degrees of extension. Dr. Jacob also noted “hypoesthesia along the left lower limb along the L5-S1 dermatome” with reflexes present in the knees and ankles.

By decision dated October 26, 1999, the hearing representative affirmed the decision terminating compensation benefits on the basis that appellant refused an offer of suitable work.

The Board finds that the Office properly terminated appellant’s compensation in this case.

Under the Federal Employees’ Compensation Act,² once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.³ In this case, the Office terminated appellant’s compensation under 5 U.S.C. § 8106(c) of the Act which provides in pertinent part, “A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation.”⁴ However, to justify such termination, the Office must show that the work offered is suitable.⁵ An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal of work was justified.⁶

In the present case, the Office properly found the job offer by the employing establishment was suitable. Based upon the reports of Drs. Kuhlengel and Sternlieb indicating that appellant was capable of working four hours per day with restrictions, the employing establishment compiled a job description of a modified letter carrier that was available and involved casing mail. The job description stated that appellant would be standing 20 to 30 minutes for a total of 2 hours per day, sitting 20 minutes up to 2 hours per day, walking 15 minutes at a time up to 1 hour per day and occasional lifting of up to 15 pounds with no

² 5 U.S.C. §§ 8101-8193.

³ *William A. Kandel*, 43 ECAB 1011 (1992).

⁴ 5 U.S.C. § 8106(c)(2).

⁵ *Vivian J. Walker*, 51 ECAB ____ (Docket No. 98-799, issued April 4, 2000); *David P. Comacho*, 40 ECAB 267 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341 (1981).

⁶ 20 C.F.R. § 10.515; *see Catherine G. Hammond*, 41 ECAB 375 (1990).

bending. On February 15, 1998 Dr. Kuhlengel stated that he had reviewed the job description and concluded that appellant was capable of performing the duties listing in the position. On July 9, 1998 the employing establishment offered appellant the position of modified letter carrier. By letter dated July 27, 1998, the Office advised appellant of the suitability of the position offered, that the job remained open and that appellant's failure to accept the offer, without justification would result in the termination of his compensation and provided him 30 days within which to accept the position or submit his reasons for refusing.

Subsequently, appellant's counsel rejected the job offer by letter dated August 28, 1998 and submitted a report by Dr. Jacob. By letter dated September 9, 1998, the Office found that appellant's reasons for refusing the job offer were not suitable and provided him 15 days within which to accept the position or submit his reasons for refusal. He did not accept the job. Thereafter, the Office terminated appellant's compensation effective November 12, 1998.

On appeal, appellant's counsel contends that the reports of Drs. Sternlieb and Kuhlengel are based upon erroneous information as they both relied upon the videotape of appellant.

The Board finds that appellant's refusal to work was not justified. The job description of modified letter carrier was available and complied with the physical restrictions described by Dr. Kuhlengel, an attending Board-certified neurological surgeon, and Dr. Sternlieb, the second opinion Board-certified orthopedic surgeon. Dr. Jacob, an attending Board-certified physiatrist, opined that appellant was totally disabled and unable to work in his December 15, 1997 report. The Board has held that a medical opinion consisting solely of a conclusory statement regarding disability, without supporting rationale, is of little probative value.⁷ Moreover, the June 3, 1998 report of Dr. Sternlieb and the February 15, 1998 report by Dr. Kuhlengel support that appellant is capable of performing the offered position. Also, contrary to appellant's contention these reports are not based upon an erroneous fact, *i.e.*, the surveillance video, as both physicians supported their opinion by objective evidence. In addition, Dr. Kuhlengel prior to reviewing the surveillance video had concluded that appellant was capable of working. The evidence of record establishes that appellant was capable of performing the offered position. The evidence of record establishes that appellant could perform the job of modified letter carrier, that it was available and within his restrictions. The Office, therefore, properly terminated benefits based on appellant's refusal to perform suitable work.

⁷ See *Marilyn D. Polk*. 44 ECAB 673, 678 (1993).

The October 26, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member